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# Substantive Law - Public Law: Constitutional Law

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## II. Substantive Law—Public Law

### CONSTITUTIONAL LAW

Charles A. Reynard\*

The past term produced five cases of significance in the field of constitutional law. In terms of personalities, these cases paraded fire fighters, chiropractors and two-fisted police officers. In terms of issues, the decisions dealt with separation of the powers, equal protection of the laws, and due process of law in both its substantive as well as its procedural aspects.

The case of the fire fighters, *City of Alexandria v. Alexandria Fire Fighters Association*,<sup>1</sup> appears to have proved the most controversial, as it provoked a dissenting opinion, while each of the other cases was decided by a unanimous court. The Legislature in 1950<sup>2</sup> provided that the work week for firemen in cities of a population of more than 250,000 should be sixty hours; that for those in cities of 250,000 and less, it should be seventy-two hours, with the proviso "that in any municipality having a population of not less than fifteen thousand (15,000) nor more than two hundred fifty thousand (250,000) if at an election held for that purpose, the majority of the members of the fire department of any city having a maximum work week of seventy-two hours, should so vote, the maximum hours of work required of firemen as herein provided in such city shall not be in excess of sixty hours in any one calendar week." In the city's suit for declaratory judgment, it asked that the statute be declared invalid as an unconstitutional delegation of legislative power to the firemen of the cities in the class described. Justice McCaleb, speaking for the majority of the court, sustained this assertion. He acknowledged that there are clear exceptions to the doctrine against legislative delegation, but found that "This is purely a legislative function which cannot be delegated to any private group."<sup>3</sup> Justice Hamiter, in his dissent, exhibited an equally strong conviction that the statute was not an unwarranted delegation of legislative authority.

In his opinion for the majority, Justice McCaleb refers to the clearly recognized exception to the rule in the case of legislative

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1. 220 La. 754, 57 So. 2d 673 (1952).

2. La. Act 239 of 1950, La. R.S. 1950, 33:1994.

3. 220 La. 754, 760, 57 So. 2d 673, 675 (1952).

delegation of power to municipalities and other political subdivisions to enact local police measures, and examples of such delegation are legion. Local option laws are a further illustration of this type of exception. He likewise acknowledged that legislation may be "conditioned for its operation upon the happening of a certain contingency or future event,"<sup>4</sup> but refused to accept the election of the firemen in this case as an application of that exception. Quoting from the decision of the Supreme Court of the United States in *Carter v. Carter Coal Company*,<sup>5</sup> he condemned the statute here as "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons."<sup>6</sup> The firemen sought to overcome the language of the *Carter* case by citation of the *Currin*<sup>7</sup> case, which came some three years after *Carter*, and sustained a delegation of authority to the Secretary of Agriculture to impose certain marketing quotas conditioned upon the favorable vote of the producers of the product to be marketed. There is some difficulty in distinguishing the subject case from *Currin*, and it was on this point that Justice Hamiter relied most strongly in his dissent.

The doctrine of delegation is but an implied corollary drawn from the proposition of the separation of the powers which is affirmatively expressed in Article II of our State Constitution, as follows:

"Section 1. The powers of the government of the State of Louisiana shall be divided into three distinct departments—legislative, executive and judicial.

"Section 2. No one of these departments, nor any person or collection of persons holding office in one of them, shall exercise power properly belonging to either of the others. . . ."

It is to be noted that the literal mandate of the Constitution simply forbids usurpation of the powers of one department by another, and it must be conceded that in this case there was no attempted encroachment on the domain of the Legislature. But the problem is not this simple, for the courts have added a gloss to the separation of the powers principle. In the exercise of its

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4. 220 La. 754, 759, 57 So. 2d 673, 674 (1952).

5. 298 U.S. 238 (1936).

6. 220 La. 754, 762, 57 So. 2d 673, 675 (1952).

7. *Currin v. Wallace*, 306 U.S. 1 (1939).

legislative powers the legislature is not merely protected against usurpation of that power by other departments, but under the doctrine of delegation it is also forbidden to assign or transfer its authority to make the laws to these other departments. The term "legislative power" therefore requires definition, and it is in this aspect of the case that the problem so frequently causes difficulty, just as it did here. The identity and character of the delegate may also present difficulty.

The author of the annotation in 79 L. Ed. 474 (1935) has certainly not overstated the complexity of the issue when he says, at page 495:

"There is considerable confusion and uncertainty as to what powers may be delegated by the legislature to private individuals, corporations, and associations, and how far the operation of a statute may be made to depend upon the action of such private persons."

And Felix Frankfurter, writing of the same problem has said, "As a principal of statesmanship, the practical demands of government preclude [the] doctrinaire application [of the principal of the separation of the powers]. . . . In a word, we are dealing with what Madison called a 'political maxim' and not a technical rule of law . . . . Enforcement of a rigid conception of separation of powers would make modern government impossible."<sup>8</sup>

A cursory examination of the Louisiana Revised Statutes discloses ample proof of the truth of this observation. In instance after instance the Legislature has placed important law-making functions in the hands of private groups. A most significant illustration is to be found in the Fair Trade Law<sup>9</sup> giving legal validity to private contracts negotiated between producer and seller, controlling the resale price of certain commodities and making sales in violation thereof actionable. Similarly, the Unfair Sales Act<sup>10</sup> confers law-making power on private groups when it makes sales below cost unlawful and provides that the term "cost" shall mean, *inter alia*, the seller's "invoice cost," a factor which is set by the privately negotiated terms of the transaction by which the seller acquires the goods. Another illustration is to be found in the

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8. Frankfurter, *The Public and Its Government* 77-78 (1930).

9. La. R.S. 1950, 51:391 et seq., sustained as to constitutionality in *Pepson Co. v. Krauss Co.*, 200 La. 959, 9 So. 2d 303 (1942).

10. La. R.S. 1950, 51:421 et seq., sustained as to constitutionality in *Louisiana Wholesale Distributors Association, Inc. v. Rosenzweig*, 214 La. 1, 36 So. 2d 403 (1948).

field of apprenticeship agreements,<sup>11</sup> where legislation permits the parties thereto through private negotiation to fix the terms of entry into and performance of a trade. Passengers on the railroads of the state are made amenable to the privately adopted rules and regulations prescribed by the management of the carriers.<sup>12</sup> In the broad field of public works a majority of the persons affected may, through elections provided for in legislation, impose their will on dissentient minorities to create drainage districts,<sup>13</sup> construct street improvements<sup>14</sup> and sidewalks,<sup>15</sup> install street lighting facilities,<sup>16</sup> establish waterworks districts,<sup>17</sup> sewerage districts,<sup>18</sup> and sewerage systems.<sup>19</sup>

The examples cited have been chosen at random, and no attempt has been made to compile an exhaustive list. Countless others could doubtlessly be found. The point is that the Legislature, as a practical matter, makes numerous delegations of regulatory powers of varying magnitude to private groups. If the power conferred on the fire fighters in the subject case "is purely a legislative function which cannot be delegated to any private group," we are left with the uncomfortable apprehension that a similar fate awaits statutes of the type referred to above if and when they are attacked on the theory of invalid delegation. Upon more sober reflection, however, it must be conceded that most, if not all, of these enactments would survive—or have indeed, already survived such attacks. How, then, explain the apparent legal paradox? The answer very probably lies in a splitting of the court's conclusion. The length of the work week of fire fighters is unquestionably a matter of such local concern to the municipalities that it could constitutionally be left to *appropriate* local determination. For while the making of that determination is unquestionably a "legislative function," there is little question that the court would support such a delegation if it were placed in the hands of the city's electors, its governing body, its taxpayers, an administrative agency—or most anyone other than the fire fighters themselves. It was very probably the

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11. La. R.S. 1950, 23:381 et seq. See *Hornsby v. LeBlanc*, 217 La. 1095, 48 So. 2d 99 (1950).

12. La. R.S. 1950, 45:521 et seq.

13. La. R.S. 1950, 33:1604, 1754.

14. La. R.S. 1950, 33:3682.

15. La. R.S. 1950, 33:3621.

16. La. R.S. 1950, 33:3651.

17. La. R.S. 1950, 33:3815.

18. La. R.S. 1950, 33:3952.

19. La. R.S. 1950, 33:3981.

character of the group selected as the Legislature's delegate that troubled the court in this case. From the language of the majority opinion it appears that the court thought that the firemen would unquestionably vote for the shorter work week and that this would result in an added burden to the taxpayers who could not vote in the election. (This would be true, of course, if the city were required to continue to pay the firemen the same amount of money for the shorter week as they had previously received for the longer week, as additional firemen would be required. If, on the other hand, the city were to pay the firemen only their pro rata compensation for sixty hours out of the wages previously earned for a seventy-two hour work week, at least some firemen would conceivably vote "no," and in any event, the extra wages saved could be used to hire the additional men required, assuming no administrative obstacles, and compliance with the minimum wage provisions of R.S. 33:1992.).

If the foregoing is a correct analysis of the majority's reasoning, it follows that it was the character of the private group to which the legislative function was delegated, and not the nature of the function, that invalidated the statute. In most of the other instances in which the Legislature has delegated regulatory powers to private groups, individuals who will be directly affected by the regulatory action taken are, in most cases, given a voice in the determination which is made.

To have brought the case clearly within the *Currin* doctrine, it would seem necessary that the Legislature provide for the interposition of a governmental agency who, acting upon the vote of the fire fighters, would find that the policy of the Legislature would be promoted by the adoption of the shorter work week.<sup>20</sup>

Equal protection and its inseparable partner, due process of law, were unsuccessfully invoked on behalf of the chiropractors in *Louisiana State Board of Medical Examiners v. Beatty*<sup>21</sup> and *Louisiana State Board of Medical Examiners v. Burton*,<sup>22</sup> and the defendants in both cases were restrained from continuing to pursue their art without licenses to practice medicine. The Louisiana

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20. For a discussion of the problem see the annotation previously cited in the text in 79 L. Ed. 474 (1935), and Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201 (1937).

21. 220 La. 1, 55 So. 2d 761 (1952).

22. 221 La. 372, 59 So. 2d 424 (1952).

Legislature by enactments adopted in 1914<sup>23</sup> and 1918<sup>24</sup> broadly defined the practice of medicine and subjected it to regulation in the public interest. The power of a state to restrict a person from engaging in the medical profession despite the due process clause of the Fourteenth Amendment has been unquestioned since 1889, when the Supreme Court of the United States decided *Dent v. West Virginia*.<sup>25</sup> In 1924<sup>26</sup> and again in 1926<sup>27</sup> persons engaging in chiropractic without having first obtained licenses to practice medicine were enjoined from such unlicensed activity. During the quarter century that followed chiropractors were neither expressly authorized to practice their art without a license, nor was the statute defining the practice of medicine repealed, amended or otherwise changed. Hence it should come as no surprise that the defendants in the two cases under discussion should similarly be enjoined in 1952. But the defendants themselves took a different view of the matter and urged the court to do likewise.

Their defense was grounded upon the legislative definition of osteopathy, adopted in 1932,<sup>28</sup> which, they argued in the abstract, indicated a general tendency to curtail the breadth of the earlier definition of the practice of medicine. The court found no basis for this contention, and, viewed realistically, it is difficult to reach any other conclusion. More specifically, however, the defendants argued that an exemption specifically created in favor of osteopaths (as well as those for chiropodists, dentists and pharmacists) constituted a denial of equal protection of the laws to the chiropractors who are not similarly favored by the Legislature. But, as the court observed, equal protection is not an inflexible barrier to classification; and viewing the exceptions which the Legislature has been creating in favor of other groups as exemptions from the "practice of medicine" concept, these exemption-classifications are not invalid unless arbitrary or unreasonable. As a matter of fact, validity is presumed in such cases, as the court itself indicated, saying, "valid ground for such an exemption in a statute will always be presumed, it being settled that a statutory discrimination will not be set aside as a denial of equal protec-

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23. La. Act 56 of 1914, La. R.S. 1950, 37:1261.

24. La. Act 54 of 1918, La. R.S. 1950, 37:1261.

25. 129 U.S. 114 (1889).

26. *Louisiana State Board of Medical Examiners v. Cronk*, 157 La. 321, 102 So. 415 (1924).

27. *Louisiana State Board of Medical Examiners v. Fife*, 162 La. 681, 111 So. 58, 54 A.L.R. 594 (1926), affirmed in 274 U.S. 720 (1927).

28. La. Act 91 of 1932; La. R.S. 1950, 37:1111.

tion of the laws 'if any state of facts reasonably may be conceived to justify it.'"<sup>29</sup>

Once the equal protection defense was overcome, no substance remained for the due process argument, for it was generally conceded that the state does have a legitimate interest in excluding unqualified persons from engaging in the practice of medicine.

*State v. Green*<sup>30</sup> was a unanimous decision reversing a murder conviction because of insufficient proof that oral and written confessions admitted in evidence at the trial were voluntarily made. The case is significant, not because it establishes any new development in jurisprudence, but because of its sad commentary upon police method. It has been an established principle of federal constitutional law since 1936<sup>31</sup> that convictions based principally upon confessions shown to have been extorted by officers of a state by brutality and violence are inconsistent with the due process of law required by the Fourteenth Amendment. Our own state Constitution declares that "No person under arrest shall be submitted to any treatment designed by effect on body or mind to compel confession of crime; nor shall any confession be used against any person accused of crime unless freely and voluntarily made."<sup>32</sup> Yet, despite the existence of these fundamental precepts, and the unbroken line of jurisprudence sustaining them, of which all law enforcement officials are presumably aware, we find the following account in the subject case:

"Defendant, an illiterate Negro, was arrested . . . and incarcerated in jail. At about 8:00 o'clock that evening Sheriff Love, accompanied by his Chief Deputy, Jimmy Harp, Deputies Albert Fairbanks and Fillmore Burley, the Jailer, and four other citizens, Burley House, Pete Davis, Eddie Davis and Ed Fairbanks, repaired to the defendant's cell for the purpose of obtaining a confession from him. He was ques-

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29. 220 La. 1, 9, 55 So. 2d 761, 763 (1952). The writer cannot suppress the urge to remark that had the court indulged this customary presumption when the legislative decision was to compel mandatory mark-up of price in package liquor while allowing sale by the drink to go unregulated in this respect, a different result would have been reached in *Schwegmann Brothers v. Louisiana Board of Alcoholic Beverage Control*, 216 La. 148, 43 So. 2d 248 (1949), criticized in this symposium two years ago, 11 LOUISIANA LAW REVIEW 197 (1950).

30. 60 So. 2d 208 (La. 1952).

31. *Brown v. Mississippi*, 297 U.S. 278 (1936).

32. Art. I, § 11. See also Art. 451, La. Code of Crim. Proc. of 1928, La. R.S. 1950, 15:451.



tioned by these men, who worked in relays, until 4:00 o'clock on (the following) morning, or for approximately 8 hours. During the vigil, defendant was *admittedly* struck in the face by Chief Deputy Jimmy Harp. Sheriff Love says that Harp slapped him but Jailer Burley (placed on the stand by the defendant) declared that Harp struck him with his fist or arm, smashing a cigarette in his mouth and knocking him against the wall and that he (Burley) then left the room because 'I didn't approve of that kind of stuff.' It is also *conceded* that, on that occasion, the defendant was told by one of his questioners 'I would like to kill you now,' and that he was cursed."<sup>33</sup> (*Italics supplied.*)

In other words, here was a case in which law enforcement officers bolstered their ranks with purely private citizens, administered third degree methods in relays for a period of eight hours in the dead of night, and admittedly used some violence and threats against the defendant. The testimony of the defendant, corroborated by that of the jailer, presents an even stronger case of force and intimidation. And yet, these same law enforcement officers sought a conviction based upon oral confessions given on the next two succeeding days and a written one given on the third. The theory advanced by the officers, as well as by the state on their behalf, was simply "that, because defendant did not confess until a day or two after the long periods of questioning, the rough treatment administered was of no consequence."<sup>34</sup>

While it is true, as the court itself concedes, if the confessions are in no way related to the third degree methods employed, they may be admitted in evidence, it is nevertheless incumbent upon the state to make an affirmative showing of those facts. Certainly in the context in which they were offered here, and without further explanation, no sensible person could assert that the confessions were free and voluntary beyond a reasonable doubt.

An observer may be wholly sympathetic with the problems confronting law enforcement agencies, and yet be wholly justified in asserting that this case is a shameful commentary on criminal justice.

Another case decided during the term which bears upon the problem of police method is *State v. Mastricovo*.<sup>35</sup> In that case the

33. 60 So. 2d 208, 214 (La. 1952).

34. 60 So. 2d 208, 215 (La. 1952).

35. 221 La. 312, 59 So. 2d 403 (1952).

defendant was convicted of unlawful possession of narcotic drugs. In the course of the trial there were offered in evidence narcotics and weighing equipment which had been seized in the course of a search without a warrant. The defendant contended, unsuccessfully, that the search having been illegal, the evidence should have been suppressed. A uniform line of jurisprudence dating back to 1920 holds that such evidence, although illegally obtained, may nevertheless be admitted in evidence. The federal rule has always been to the contrary.<sup>36</sup> And the result remains unchanged despite the recent decision of the Supreme Court of the United States in *Wolf v. Colorado*,<sup>37</sup> holding that the Fourth Amendment is applicable to the states through the due process clause of the Fourteenth Amendment. In a characteristically eloquent dissenting opinion in that case, Mr. Justice Murphy underscored the necessity, as he saw it, for extending the federal rule to state police officials who all too frequently show a callous disregard for the right of privacy intended to be secured by the Fourth Amendment.<sup>38</sup>

The *Mastricovo* case was the first to be decided since the decision in *Wolf v. Colorado*, and it was at least to be hoped that the court might reappraise the Louisiana rule in the light of what was said there. However, the case was not cited, and the principle involved in the *Wolf* case is dismissed with the mere citation of prior Louisiana jurisprudence.

## LABOR LAW

Charles A. Reynard\*

The past term, like the one which preceded it, produced one case in the field of labor law. *Jones v. Hansen*<sup>1</sup> was a suit by three union members against seven of their brothers who had served as a trial committee to hear and decide charges against the plaintiffs, resulting in expulsion of one and suspension of the other two from the union. Plaintiffs asked for wages lost and for damages attributable to the defendants' advising employers that plaintiffs were no longer members of the union in good stand-

36. *Weeks v. United States*, 232 U.S. 383 (1914). See also Reynard, *Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 Ind. L.J. 259 (1950).

37. 338 U.S. 25 (1949).

38. See Reynard, *supra* note 36, at 306.

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1. 220 La. 673, 57 So. 2d 224 (1952).